(5)

Supreme Court, U.S.
FILED
SEP 27 2004
OFFICE OF THE CLERK

No. 04-165

IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., *et al.*,

Petitioners,

v.

DON C. KENNARD and HARROLD E. WRIGHT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

PAT S. HOLLOWAY
4002 Spanish Oak Lane
Dripping Springs, Texas 78620
(512) 894-3398

Attorney for Respondents

190042

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Pursuant to Rule 15.8, Respondents Don C. Kennard and Harrold E. Wright respectfully file this supplemental brief to advise the Court of last week's decision of the Fifth Circuit in *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System,* No. 03-20376, __ F.3d __, 2004 WL 1959083 (5th Cir. September 21, 2004), dealing with the "original source" issue under the FCA.

The Fifth Circuit held that a former executive director of a hospital did not qualify as an "original source" where her knowledge was derived almost entirely from publicly disclosed information. For example, her knowledge of noncompliance was "based entirely on public records of testimony." 2004 WL 1959083 *6. She simply added a legal conclusion to the investigative work of others. *See id.* at *8. ("Reagan took disclosures that had already been investigated and reported by BCBS and HCFA and, based on her own experience, claimed that they were fraudulent; this disagreement with the legal conclusions of BCBS and HCFA does not qualify as 'information' under the original source exception.")

The Fifth Circuit's decision does not establish a circuit conflict. First, Wright did not examine or rely on any public records. Pet. App. 12a. Second, the Tenth Circuit agreed that "[a] mere compilation of documents or reports in the public domain will not allow a relator to qualify as an original source." Pet. App. 10a. Third, in the case at bar, "none of the public documents disclosed the alleged fraud." *Id.* at 13a-14a. "Relator's claim did not derive from a third party's research and investigation." *Id.* at 13a. Rather, Relators discovered the fraud and had first-hand knowledge of the information alleged in their FCA complaint — and of the same information alleged in the public disclosure by their

own renegade attorney Sydow who filed his competing non-FCA case for the Tribe, based solely and exclusively on the information supplied by Relators, one day before Relators filed this FCA case.

Relators' knowledge included first-hand knowledge of the actual fraudulent conduct by virtue of their personal review of the false MMS-2014 Reports.

Tellingly, the Fifth Circuit rejected Petitioners' interpretation of Section 3730(e)(4). The Fifth Circuit opined that "[u]nder this standard the relator is not required to 'have "direct and independent" knowledge of each false claim alleged in his complaint.' Instead the relator is simply required to possess direct and independent knowledge of the 'information on which the public allegations are based.'" 2004 WL 1959083, *6. Compare Petr. Reply at 6 and n.5. In the case at bar, Relators' knowledge of the information in the public disclosure happens to be exactly equal to their knowledge of the information in their own FCA complaint, because the public disclosure by their miscreant attorney Sydow was based solely and exclusively on the information Relators had furnished to him in confidence as their attorney.

As to the amount and nature of the information required, the Fifth Circuit adopted the same analytical approach as the Tenth Circuit:

> we are required to "look to the factual subtleties of the case before [us] and attempt to strike a balance between those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those

> actually involved in the process of unearthing important information about a false or fraudulent claim."

2004 WL 1959083, *6 (citation omitted).

Indeed, the Fifth Circuit indicated that even second-hand information may be converted into "direct and independent knowledge" if "the investigation or experience of the relator either must translate into some additional compelling fact, or must demonstrate a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed." 2004 WL 1959083, *7.

The Fifth Circuit's decision thus offers no support to petitioners' argument and in fact strongly supports Relators.

Respectfully submitted,

PAT S. HOLLOWAY
4002 Spanish Oak Lane
Dripping Springs, Texas 78620
(512) 894-3398

Attorney for Respondents